

AMENDED IN ASSEMBLY JANUARY 11, 2006

AMENDED IN ASSEMBLY MAY 2, 2005

CALIFORNIA LEGISLATURE—2005–06 REGULAR SESSION

## ASSEMBLY BILL

**No. 1302**

**Introduced by Assembly Member Jerome Horton**  
(Coauthor: Senator Alquist)

February 22, 2005

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An act to amend ~~Sections 11340, 11340.1, 11346.5, 11346.9, 11349, and 11349.1 of the Section 11340.5 of, and to add Section 11342.620 to, the Government Code, relating to agency regulations~~ *state agencies.*

### LEGISLATIVE COUNSEL'S DIGEST

AB 1302, as amended, Jerome Horton. ~~State agency regulations.~~  
*Office of Administrative Law: regulations.*

*Existing law prohibits a state agency from issuing, utilizing, enforcing, or attempting to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, unless it has been adopted as a regulation and filed with the Secretary of State. Under existing law, if the Office of Administrative Law is notified, or learns on its own, that an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has not been adopted as a regulation and filed with the Secretary of State, the office may issue a determination as to whether it is a regulation.*

*This bill would provide that any guideline, criterion, bulletin, provision in a manual, instruction, order, standard of general application, or other rule or procedure that is a regulation but is not adopted as a regulation and filed with the Secretary of State*

*constitutes an “underground regulation” and would establish a procedure for any interested person with information that a state agency has issued, used, enforced, or attempted to enforce an underground regulation to petition the Office of Administrative Law for a determination that this agency action is an invalid underground regulation. It would require the office, within 30 days after receiving a petition, to accept or reject the petition and would make this decision not subject to judicial review. It also would provide that, if the office accepts the petition, then the office is required, no later than 150 days after public notice of an accepted petition, to determine whether the agency action is an underground regulation and therefore invalid. It also would suspend these requirements connected with a petition if the agency issuing the alleged underground regulation certifies that it will not issue, use, enforce, or attempt to enforce the regulation.*

~~The Administrative Procedure Act sets forth the procedures and requirements a state agency is required to follow when adopting, amending, or repealing a regulation. The act requires an agency to submit to the Office of Administrative Law each adopted, amended, or repealed regulation and a statement of reasons that includes, among other matters, an explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses. It requires the office to review all regulations submitted to it and make determinations using specified standards, as defined.~~

~~This bill would require an agency, when adopting, amending, or repealing a regulation, to submit to the office a finding supported by substantial evidence that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private individuals, businesses, and small businesses than the adopted regulation, and an explanation setting forth the reasons for rejecting any proposed alternative that would have been as effective as the adopted regulation but impose fewer burdens on private individuals, businesses, and small businesses. It would require the office, when reviewing regulations submitted to it, to make determinations using the standard of burden, defined to mean that no alternative would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private individuals, businesses, and small~~

~~businesses than the adopted regulation. It would make other conforming changes.~~

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1     *SECTION 1. Section 11340.5 of the Government Code is*  
2     *amended to read:*

3     11340.5. (a) No state agency shall issue, ~~utilize use~~, enforce,  
4     or attempt to enforce any ~~guideline, criterion, bulletin, manual,~~  
5     ~~instruction, order, standard of general application, or other rule,~~  
6     ~~which is a underground~~ regulation as defined in Section  
7     ~~11342.600, unless the guideline, criterion, bulletin, manual,~~  
8     ~~instruction, order, standard of general application, or other rule~~  
9     ~~has been adopted as a regulation and filed with the Secretary of~~  
10    ~~State pursuant to this chapter 11342.620.~~

11    ~~(b) If the office is notified of, or on its own, learns of the~~  
12    ~~issuance, enforcement of, or use of, an agency guideline,~~  
13    ~~criterion, bulletin, manual, instruction, order, standard of general~~  
14    ~~application, or other rule that has not been adopted as a~~  
15    ~~regulation and filed with the Secretary of State pursuant to this~~  
16    ~~chapter, the office may issue a determination as to whether the~~  
17    ~~guideline, criterion, bulletin, manual, instruction, order, standard~~  
18    ~~of general application, or other rule, is a regulation as defined in~~  
19    ~~Section 11342.600.~~

20    ~~(c) The office shall do all of the following:~~

21    ~~(b) Any interested person with information that a state agency~~  
22    ~~has issued, used, enforced, or attempted to enforce an~~  
23    ~~underground regulation as defined in Section 11342.620 may~~  
24    ~~petition the office for a determination that a particular guideline,~~  
25    ~~criterion, bulletin, provision in a manual, instruction, order,~~  
26    ~~standard of general application, or other rule or procedure is an~~  
27    ~~underground regulation and, therefore, invalid, and that the state~~  
28    ~~agency shall withdraw and cease immediately to use, enforce, or~~  
29    ~~attempt to enforce the underground regulation. The petition shall~~  
30    ~~include all of the following:~~

31    ~~(1) The name and contact information of the petitioner.~~

1     (2) *The name and contact information of the agency that has*  
2 *allegedly issued, used, enforced, or attempted to enforce an*  
3 *underground regulation.*

4     (3) *A complete description of the particular underground*  
5 *regulation, and a copy of any written expression of the*  
6 *underground regulation.*

7     (4) *A description of the actions of the agency evidencing that it*  
8 *has issued, used, enforced, or attempted to enforce the*  
9 *underground regulation.*

10    (5) *The legal basis for concluding that the guideline, criterion,*  
11 *bulletin, manual, instruction, order, standard of general*  
12 *application, or other rule is a regulation as defined in Section*  
13 *11342.600 and that no express statutory exemption to the*  
14 *requirements of this chapter is applicable.*

15    (6) *Information demonstrating that the petition raises an issue*  
16 *of considerable public importance requiring prompt resolution.*

17    (c) *Upon the filing of the petition, the petitioner shall submit a*  
18 *copy of the petition and all attachments to the agency.*

19    (d) (1) *No later than 30 days after receipt of a complete*  
20 *petition filed pursuant to subdivision (b), the office shall accept*  
21 *or reject the petition, in its entirety or in part, unless, prior to the*  
22 *end of the 30-day period, the agency submits to the office a*  
23 *certification pursuant to subdivision (i). If the office rejects the*  
24 *petition, it shall immediately advise the petitioner and the agency*  
25 *of the rejection and specifically indicate that the rejection*  
26 *reflects no opinion of the office upon the issues raised by the*  
27 *petition. A decision by the office to reject a petition is not subject*  
28 *to judicial review.*

29    (2) *If the office accepts the petition, it shall notify the*  
30 *petitioner and the agency of its acceptance and shall publish the*  
31 *petition or a summary of the petition in the next California*  
32 *Regulatory Notice Register, giving notice to the public that*  
33 *comments on issues raised by the petition may be submitted to*  
34 *the office. Any person submitting comments to the office shall*  
35 *simultaneously provide a copy of the comments to the agency.*  
36 *The agency shall submit to the office a response to the petition*  
37 *and shall serve a copy of any response to the petition on the*  
38 *petitioner. The petitioner may submit a reply to the agency's*  
39 *response to the office and to the agency after being served with*  
40 *that response.*

1 (3) *After the time for the petitioner to submit a reply to the*  
2 *agency's response, and no later than 150 days after publication*  
3 *of the accepted petition in the California Regulatory Notice*  
4 *Register, the office shall issue a determination as to whether or*  
5 *not the particular guideline, criterion, provision in a manual,*  
6 *instruction, order, standard of general application, or other rule*  
7 *or procedure is an underground regulation.*

8 (e) *Upon issuing a determination pursuant to paragraph (3) of*  
9 *subdivision (d), the office shall do all of the following:*

10 (1) ~~File its determination upon issuance~~ with the Secretary of  
11 State.

12 (2) Make its determination known to the agency, the  
13 Governor, and the Legislature.

14 (3) Publish its determination in the California Regulatory  
15 Notice Register within 15 days of the date of issuance.

16 (4) Make its determination available to the public and the  
17 courts.

18 ~~(d)~~

19 (f) Any interested person may obtain judicial review of a ~~given~~  
20 *determination issued pursuant to paragraph (3) of subdivision*  
21 *(d) by filing a written petition requesting that the determination*  
22 *of the office be modified or set aside. A petition shall be filed*  
23 *with the court within 30 days of the date the determination is*  
24 *published.*

25 ~~(e)~~

26 (g) A determination issued by the office pursuant to this  
27 section shall not be considered by a court, or by an administrative  
28 agency in an adjudicatory proceeding if all of the following  
29 ~~occurs~~ *occur*:

30 (1) The court or administrative agency proceeding involves the  
31 party that sought the determination from the office.

32 (2) The proceeding began prior to the party's request for the  
33 office's determination.

34 (3) At issue in the proceeding is the question of whether the  
35 *particular guideline, criterion, bulletin, provision in a manual,*  
36 *instruction, order, standard of general application, or other rule*  
37 *or procedure that is the legal basis for the adjudicatory action is*  
38 *a regulation as defined in Section 11342.600 or an underground*  
39 *regulation as defined in Section 11342.620.*

1     (h) The office shall adopt regulations to implement this  
2     section, which shall include regulations specifying the time to file  
3     comments on a petition, responses, and replies, and which may  
4     include, but not be limited to, the following:

5     (1) Authorizing a party who filed comments on a petition to  
6     submit a reply to the agency's response to the petition.

7     (2) Authorizing the office to extend the time for an agency to  
8     file a response to a petition if the agency is a "state body" as  
9     defined in Section 11121 and the agency's response requires  
10    action taken at a meeting subject to Article 9 (commencing with  
11    Section 11120) of Chapter 1.

12    (i) Any action required of the office or an agency by this  
13    section in connection with a petition shall be suspended if the  
14    office receives a certification from the agency that it will not  
15    issue, use, enforce, or attempt to enforce the alleged  
16    underground regulation along with proof that the certification  
17    has been served on the petitioner. This certification shall be  
18    made by the head of the agency or a person with a written  
19    delegation of authority from the head of the agency in the form  
20    specified by Section 2015.5 of the Code of Civil Procedure. Upon  
21    receipt of this certification and proof of service, the office shall  
22    do all of the following:

23    (1) File the petition and the certification with the Secretary of  
24    State.

25    (2) Publish a summary of the petition and the certification in  
26    the California Regulatory Notice Register.

27    (3) If the certification is received after the petition or summary  
28    of the petition has been published in the California Regulatory  
29    Notice Register, make the petition and certification known to the  
30    Governor and the Legislature.

31    SEC. 2. Section 11342.620 is added to the Government Code,  
32    to read:

33    11342.620. "Underground regulation" means any guideline,  
34    criterion, bulletin, provision in a manual, instruction, order,  
35    standard of general application, or other rule or procedure that  
36    is a regulation as defined in Section 11342.600, but has not been  
37    adopted as a regulation and filed with the Secretary of State  
38    pursuant to this chapter.

39    ~~SECTION 1. Section 11340 of the Government Code is~~  
40    ~~amended to read:~~

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**All matter omitted in this version of the bill  
appears in the bill as amended in Assembly,  
May 2, 2005. (JR11)**

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